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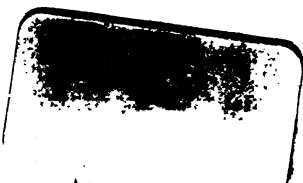
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The Divorce Problem

IN

New Hampshire

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ADDRESS

ON THE

DIVORCE PROBLEM

IN

NEW HAMPSHIRE

DELIVERED BEFORE THE

N. H. CONFERENCE OF CHARITIES AND
CORRECTIONS

AT FRANKLIN, N. H.

BY
SHERMAN E. BURROUGHS, ESQ.,
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ADDRESS.

Seventeen years ago Mr. Gladstone, the great English statesman, declared in an article published in the *Nineteenth Century*, that while we must be aware of all sweeping and premature conclusions "It seems indisputable that America is the arena on which many of the problems connected with the marriage state are in the course of being rapidly, painfully and perilously tried out." About the same time, in a letter to Doctor Dike, corresponding secretary of the National League for the Protection of the Family, Mr. Gladstone said, "My attention had for some time been drawn to the condition both of law and of practice touching divorce in some of the states of the Union, and the facts caused me some alarm as to the future of your great country." More recently our attention has been drawn to this question of marriage and divorce by the action of great religious bodies concerning it, by reference to it in a recent message to Congress by the president of the United States, by a resolution of Congress providing for a compilation of statistics concerning it, and by the very recent convention of Commissioners on Uniform Divorce Laws held in Washington at the suggestion and by the invitation of the governor of Pennsylvania. Also, the subject has been discussed at great length in the newspaper and periodical press, until it would seem that pretty nearly every possible shade of opinion upon it has been expressed. It is not with any presumptuous idea or expectation of furnishing a solution of this complex and difficult problem, much less of reconciling the diverse and conflicting views upon it, that I venture into the controversy today, but rather with the hope that I may be able to present some

facts and considerations bearing upon this question as it especially affects our own state. And in order that my point of view may not be misunderstood I wish to state at the outset that I shall not attempt to discuss the matter from a religious standpoint, nor shall I discuss in detail the ethics of the divorce question, or attempt to set the standard by which right-minded people should be governed irrespective of the law, but my purpose is to attempt to place before you as plainly and concisely as I am able, the exact situation, both so far as the facts and the law are concerned; to attempt to account for this condition if possible, and finally to discuss some possible means of relief. What, then, is the situation of New Hampshire today with reference to divorce.

If you will turn to the last report of the State Registrar of Vital Statistics for the years 1902 and 1903 (in addition to which you will be able to obtain from the registrar almost complete returns for the year 1904), you will find the following interesting facts: In 1870 there were 149 divorces in New Hampshire; in 1880, 339; in 1890, 382; in 1900, 426; in 1901, 482; in 1902, 483; in 1903, 518; in 1904, 525.

The average number between 1870 and 1880 was 222; the average number between 1880 and 1890 was 327; the average number between 1890 and 1900 was 406; the average number between 1900 and 1904 was 487.

In 1885 the number of persons divorced per thousand of population was 1.6; in 1890, 2; in 1895, 2; in 1900, 2.1; in 1903, 2.5. Statistics available for the year 1900 show that this percentage in Maine was 2.3; in Rhode Island, 2.2; in Vermont, 1.3; in Massachusetts, 1.1; in Connecticut, which is generally considered to be the banner state for divorces, it was considerably less than one.

The rate of increase in New Hampshire in the period 1900 to 1904 was 23.2 per cent., or double that of any similar period for the last 20 years.

Turning now to the statistics in regard to marriages (available as far back as 1882), we find that between 1882 and 1890 there was an increase in the number of marriages of about $5\frac{1}{2}$ per cent.; between 1890 and 1900 practically 10 per cent.;

while the period 1900 to 1904 shows an actual decrease of a little less than 5 per cent.

In 1882 the ratio of divorces to marriages was 1 to 10.9; in 1890, 1 to 9.5; in 1900, 1 to 9.4; in 1901, 1 to 8.3; in 1902, 1 to 8.4; in 1903, 1 to 7.7; and 1904 there was 1 family broken up in New Hampshire to every 7.2 families that were formed in the state. It is believed that few states in the Union show a higher percentage of divorce to marriages than New Hampshire. Statistics available show that in Vermont in 1902 this ratio was 1 divorce to 10 marriages; in Rhode Island 1 to 8.4; in Ohio 1 to 8.8; in Massachusetts 1 to 16.

Of the 525 divorces granted in New Hampshire during the year 1904, 386, or 74 per cent., were upon the three grounds of abandonment, adultery and extreme cruelty; and if to these be added the two additional grounds of willing absence and treatment endangering health, the number is increased to 478, or 91 per cent of all divorces granted for all causes.

Of the 10 counties in the state only two, Strafford and Hillsborough, showed a decrease in the number of divorces granted in 1904 over 1903, but the number in Hillsborough (127) was considerably larger than the average in the same county during the past five years. The increase seems to be as proportionately great in the rural counties as in those having a large urban population.

In 23 years between 1882 and 1904 there were 18,310 persons divorced in New Hampshire, and of this number 4,868 were divorced during the period 1900 to 1904.

It seems impossible that one should rise from even a cursory examination of these statistics without a feeling amounting almost to conviction that there is indeed a divorce problem in New Hampshire of vast and far-reaching import. What is it? What is the great essential fact that appears in the statistics I have quoted, and which every lawyer, at least, must know from his own experience? What is the thing here shown of which we complain? It is this, that from whatever cause, it is becoming increasingly easy to obtain divorces in New Hampshire; and that their increase in number, especially in recent years, has

been abnormal, entirely disproportionate either to marriages or population.

I do not wish to be understood as saying that New Hampshire stands alone in this position of unenviable notoriety. On the contrary, the evidence seems to be that many other states have substantially the same problem. We are not, however, responsible for their problems. Until we have made reasonable effort to solve them we are in a large measure responsible for our own.

Now if this is the condition, and I do not see how it can be denied, what is the significance of it, what does it mean? Is it a right condition or a wrong condition? Is it a healthy condition or an unhealthy condition? Upon this question there does not seem to be much real difference of opinion. Some would call it a disease while others would regard it merely as a symptom of a disease more deeply seated in the social body; but if we except those who believe in divorce by consent, which, of course, means nothing more than the complete dissolution of the family as a social unit, we find substantial agreement upon the proposition that divorce is, at least, not a thing to be desired for its own sake. The best that can be said of it is that it is like medicine, a necessary evil.

Bishop, in his great work on marriage, divorce and separation, says: "Evils numberless, extending to the demoralization of society itself, would follow the abandonment of marriage as a permanent status and permitting it to be the subject of experimental and temporary arrangements and fleeting partnership. Wisely, therefore, the law holds it to be a union for life. It is so also in reason, in the common sentiments of mankind and in the teachings of religion." Chancellor Kent said many years ago, "It is very questionable whether the facility with which divorces can be procured in some of the states be not productive of more evil than good." If he spoke thus guardedly at that time, what think you would he probably say of present conditions. Professor Schouler, another eminent legal writer on the domestic relations, says that "There is a growing and dangerous laxity in the United States as to the permanency

of the marriage relation." Many other similar quotations might be given, but it would seem that when more than a thousand people are divorced in this little state within a single year it requires no argument to show that something is wrong in the social body. In order to find out what that something is it will be necessary for us to inquire what are the causes which have produced this condition?

How is it to be accounted for? Here we find great diversity of opinion, not the least interesting of which is the one given by Hetty Green, viz. : that it is poor cooking ; her notion being that more divorces are caused by hash than by infidelity. Some would attribute it to loose laws. Others think the laws are all right, but that the trouble is in the procedure. While others look farther back and find deeper and more complex causes in the social organism. Some, like Professor Howard, the author of a recent valuable treatise on matrimonial institutions, think that this and other perils to the family have their origin and cause in economic institutions. He thinks that the divorce problem is a phase of the emancipation movement ; that it is in part "An expression of woman's growing independence." Others, taking a somewhat similar view, hold that it represents woman's revolt from the marital authority of mediæval times, when the husband was the absolute lord of the family, the wife little more than his slave and the children his property.

So far as the divorce movement is in fact an expression of woman's desire for equality with man, it ought not to be restricted, but rather to be encouraged. I feel very positive, however, that a careful examination will convince anyone that woman's advancement towards equality with man in New Hampshire has not been aided in any material degree hitherto, and is not likely to be aided to any considerable degree hereafter, by the fact that she can obtain from her husband an absolute divorce with right of remarriage, on any one of fourteen different grounds.

We hear much about the hardships that result from the marriages between drunken, immoral, brutal and cruel husbands and pure, refined and sensitive wives, or perhaps between vain, inane and enfeebled wives and intellectual and honorable men.

But let me ask you, are these the cases that come into the divorce courts? Who, except in the rarest instances, ever saw or heard of these "refined" and "sensitive" women seeking divorces from their "brutal" and "cruel" husbands? No! Such people realize no doubt their mistake, but they are too "refined" and too "sensitive" and too cultured, and have too high a sense of honor to think that they can absolve themselves or be absolved from the obligations voluntarily taken upon themselves at the marriage altar. Besides, almost any lawyer, I think, would tell you from his own experience that while it is the woman more often than the man who applies for the divorce, it is the man more often than the woman who wants the divorce. Perhaps he finds some other person whom he likes better than the one to whom he has pledged his troth. He realizes that he, himself, has no cause for divorce, but by persuasion, bribes, threats, or cruel and abusive treatment, he finally induces his wife to get the divorce for him.

I recently had a case in my own experience where a woman came to me in regard to a divorce. She said she did not want to get it; and I soon found out that her husband was behind the whole matter and that another woman was behind him. I have had two such cases within one year. I do not believe that in the average case the woman wants the divorce. She would be entirely satisfied if she could be separated from the man who has abused her. He, however, wants an absolute divorce, because, in the majority of cases, he has found somebody else with whom he wishes to form another matrimonial connection, and these guilty parties are the real ones who are being benefitted by the divorce.

I believe that the large increase in the number of divorces, and the facility with which they are obtained, is due in a large measure to the fact that there is any such thing allowed as absolute divorce. I agree with Mr. John M. Shirley, a former eminent member of the New Hampshire bar, now dead, who said some years ago in an address before the New Hampshire Historical Society: "The judicial scales have always inclined, and do to this day, against divorce. The real difficulty lies deeper. So long as divorces are allowed for any cause, there will,

in spite of the judges, be what are practically divorces by consent. Married couples, for a variety of causes and under a great variety of circumstances, grow weary of the tie, or one of the parties does, and the other at last makes no sign."

No doubt another cause is to be found in the modern erroneous conception of marriage as being simply an association between two individuals for the promotion of their mutual happiness, and nothing more, losing sight entirely of the social purpose involved. In the majority of marriages I think it safe to say that personal happiness is set up as the goal. People forget that in every marriage there are three parties instead of two,—the man, the woman, and the state,—and when it comes to divorce there are often still others involved. I believe it is one of the cruelest and most pathetic incidents of this whole miserable divorce business, that the rights of little children are so often bartered in the negotiations by which a separation is secured. I believe that our courts do all they can to prevent this, but yet I am positive that in very many cases the rights of children are not properly safeguarded.

Another fruitful cause of divorce is, in my opinion, the lax laws in regard to marriage. It is not generally known, I think, that in this state of New Hampshire two children, a girl thirteen years old, and a boy fourteen years old, can, without the consent of their parents, guardians, or anybody else, get married, if they can find a minister or a justice of the peace to perform the ceremony. Then, for any one of fourteen different causes, they can be absolutely divorced within six months, and each seek out a different partner. There is nothing in the world to prevent this process from being repeated again and again, until, as in Rome, the woman would reckon her age "by her husbands and not by the consuls."

But, perhaps, the principal cause or occasion that promotes this rapid increase in divorces and the facility with which they may be obtained is the method of procedure by which so many cases are allowed to be determined on the testimony of only one of the parties interested. Although no statistics on this point are available, I feel perfectly safe in saying that fully three fourths, and probably a much larger percentage of all the

divorce cases brought into our courts, are what is known as defaulted cases ; that is, they are cases where, for one reason or another, the libellee, or party against whom the proceeding is brought, fails to appear in opposition to the petition. It may be that the charges are notoriously untrue. Many times I have had parties come to me and say that it would be perfectly easy to disprove the allegations of the petition. Why don't they do it, then? Well, they dread the publicity that is sure to be given to a contested divorce case ; they dislike to have all their family affairs served up as a sweet morsel to satisfy the craving of the morbidly curious. Or another says: "Oh, what is the use in my trying to keep the home when he has lost interest in it? I know this is nothing but an excuse ; there is nothing to it at all, but if he feels that way I do not want to hold him any longer." And so, as Mr. Shirley said, we have what is practically divorce by consent. The husband gets it on insufficient grounds because his wife, from motives of delicacy, hesitates to oppose him ; or, as often happens, the wife gets it on sufficient grounds, perhaps ; not because she wants it, however, but because her husband has teased, or goaded, or bribed her by the offer of sufficient alimony, to get it, in order that he may be at liberty to marry some one else. Such cases, if all the facts should appear, would have nothing but incompatibility to stand on, and that is not a legal cause of divorce anywhere.

But where, do you ask, is the great public in these divorce proceedings? Where is the state, whose interest is so great that Bishop and others tell us that it is the only consideration involved? What precaution has the state taken to see that the record upon which the court is to render judgment states the exact truth, and that the rights of the public in this marriage contract to which it is so interested a party, are suitably protected? I answer, none whatever. Suitable provision is made for notice to the offending husband or wife, but the state gets no notice of divorce proceedings and never appears in court to contest them ; hence, in the great majority of cases, the party asking for the divorce comes into court and tells his or her story, often with no substantiating testimony whatever to the facts, and

after a hearing of perhaps a half an hour a divorce is granted, often the custody of children determined, and a status or relation which the law recognizes as the basis of the social order, is absolutely and immediately dissolved, leaving the innocent and guilty party alike entirely free to make another experiment.

To sum up in a few words what I have already said, there is increasingly frequent and easy divorce in New Hampshire. This fact indicates an unhealthy, not to say dangerous, condition, and one which, if continued, points to a decline in the standard of domestic morality. It has two chief causes: first, the lax method under which a status or relation in which husband, wife, children and the state, are all vitally interested as parties, is in the great majority of cases, allowed to be dissolved in a proceeding in which only one of these parties is represented in court; and second, to the low standard of social ethics particularly concerning marriage. Once admit that marriage is simply a relation between husband and wife for their mutual happiness, and divorce follows as a private right whenever that chief purpose of the marital relation can no longer be attained.

Now as to the remedy so far as the laws are concerned. "The laws of the American States produced since 1789," declares Brice, "present the largest, the strangest, and perhaps the saddest body of legislative experiments in the sphere of domestic relations, which free, self-governing communities have ever tried."

Our laws in New Hampshire at present are based on the theory that *prima facie* marriage is a benefit to the state and divorce a harm; hence, that any marriage should be encouraged and any divorce discouraged. In other words, that there should be a broad way in and a narrow way out. That theory is wrong. Hence have followed the many unfortunate marriages and the collusion of parties to escape; so that in practice we now have not only a broad way in, but an equally broad way out. That practice is also wrong. Marriages of the unfit, the diseased, the delinquent, the immature, are not beneficial to the state. As Professor Howard truly says in his great work on matrimonial institutions, "Marriages thus formed are almost sure to be miserable failures from the start."

Greater restrictions should be placed upon marriages. I should say first, the age of consent for marriage, without the consent of parent or guardian, should coincide with the attainment of legal majority. This is in accord with the view of the best students of social conditions today. Second, notice of intention should be recorded a reasonable time, say ten days, before issuance of a marriage license or certificate; and during this time it should be officially posted and also published. Objections might then be filed, and in case of need, tried before some magistrate clothed with proper jurisdiction, before celebration was allowed to proceed. Third, a marriage entered into without license, as without consent, ought to be null and void. In other words, our restrictive statutes ought not to be as they are now, simply directory, having no other effect in case of violation than the imposition of a fine upon the offending officer. They ought to be mandatory and declare conditions precedent to the contracting of a valid marriage. I understand that this might in some instances mean that innocent offspring would be made illegitimate, but it is believed that on the whole such legislation would promote the general good. If this is so, the fact that there might be particular instances of hardship is no argument against it.

Having thus in some degree restricted the way into the marriage relation, I believe the public sentiment would more strongly support the theory on which the law has always rested and ought to rest, viz., that it should be a difficult matter to get out of it.

At the recent National Congress of Uniform Divorce Laws held in Washington, and having in its membership some of the ablest lawyers in the country, the following was adopted among other resolutions: "An innocent and injured party, husband or wife, seeking a divorce, should not be compelled to ask for a dissolution of the bonds of matrimony, but should be allowed, at his or her option, at any time, to apply for a divorce from bed and board." This would be a restricted form of divorce or a legal separation, protecting all the property rights of the parties, but without the right of remarriage.

I am aware that the sentiment expressed in this resolution is

practically controverted by Professor Howard and by Bishop in his well-known text-book on marriage and divorce, but there are, at least, two valid and, to my mind, sufficient reasons in its favor. First, it meets the case where, by reason of conscientious objections to absolute divorce, the injured wife is restricted to this form of relief. Second, it effectually prevents an offending husband from taking advantage of his own wrong. It is a fact well known among attorneys that a large proportion of divorces are sought with the intent of immediate remarriage, and the party who is actually guilty of having broken up the family is often times aiding and assisting in procuring the divorce. Not the least of the reasons in favor of this form of separation is the fact that it would leave open to the parties the opportunity for reconciliation.

We have in this state at the present time a form of legal separation by which the wife may secure herself from interference or control on the part of her offending husband and obtain an order for her separate support, but the law as it now stands in this state does not sufficiently secure her in her property rights. There would be nothing to prevent the delinquent husband from returning after years of absence and claiming his share upon her decease in his wife's hard-earned savings. Our statutes should be amended to meet this very obvious defect.

I would also provide that all decrees of absolute divorce should in the first instance be decrees *nisi*, that is, conditional decrees, and become absolute as of course after the expiration of one year from the entry thereof, unless the court for a sufficient cause shall otherwise order. This was also recommended by the divorce congress and is in substance already the law in Massachusetts, Wisconsin, California, Illinois, and other states. The provision of the Massachusetts law that the guilty party to a divorce shall not remarry for a period of two years after the decree, is also a good one, and would tend to prevent so many defaulted cases. In order further to prevent so many defaulted or uncontested cases I would provide, as is now done in Indiana and other states, that the attorney-general should appear for the state, and a guardian *ad litem* be

appointed to represent children, where there are children, in all divorce proceedings. It is believed that in a matter of such vital concern to society, the state should at least do this much to protect its own interests and see to it that all the facts are brought to the attention of the court.

Lastly I would provide that all collusion between parties in divorce proceedings should be made an offence under the criminal law.

I do not expect that these or any other changes in our statutes would stop divorce. That will only be done by a process of education when the organic facts which are of vital concern to the human race shall be taught in our public schools, as they ought to be; when the daughter is "told of the destiny that awaits her as wife and mother," and the son has "learned to repudiate the dual standard of sexual morality which a spurious philosophy has set up"; but such changes as I have suggested would be in the line of progress and in my judgment would do much to prevent this scandal of increasing and facile divorce and remarriage.

I cannot do better in closing this discussion than to adopt as my own the impressive declaration of President Roosevelt that "If the Nation shall solve every other problem in the wisest possible way, it shall profit us nothing if we shall have lost our own national soul, and we will have lost it if we do not have the question of the relations of the family put upon the proper basis."

Edw. B. 2-14-28

